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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

[Docket No. FAA-2015-2836]

Guidance on the Procedures and Process to Petition the Secretary under the Airport and Airway Improvement Act

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Notice of final policy.

SUMMARY: This final policy establishes the procedures and processes to petition the Secretary under the Airport and Airway Improvement Act 49 U.S.C. section 47106(c)(1)(A)(ii). The Federal Aviation Administration (FAA) issued guidance on the procedures and process to petition the Secretary under 49 U.S.C. section 47106(c)(1)(A)(ii) in the Federal Register on August 4, 2015. This guidance is intended to provide detail and clarity about who may petition the Secretary, when such a petition may be filed, how the petition may be made, and the procedures and process to petition the Secretary under this Section of the Airport and Airway Improvement Act.

EFFECTIVE DATE: The Guidance becomes effective immediately upon publication in the Federal Register.

SUPPLEMENTARY INFORMATION: By Federal Register Notice issued on August 4, 2015 (80 FR 46380), the FAA notified the public of the issuance for public comment of proposed Guidance on the Procedures and Process to Petition the Secretary under the Airports and Airway Improvement Act. FAA requested comments, suggestions and recommendations that would assist the agency in assessing and understanding the potential effects and implications of providing guidance on the procedures for and process of the right to petition the Secretary under 49 U.S.C. Section 47106(c)(1)(A)(ii). The Notice called for public comments to be received by FAA on or before October 5, 2015. No comments were received by that date. Other than editorial changes and one minor clarification, this final Guidance is identical to the proposed guidance.

I. Background.

In 1982, Congress enacted the Airport and Airway Improvement Act (AAIA) (Pub. L. 97-248). Relevant portions of the AAIA are codified in 49 U.S.C. Chapter 471, Subchapter I, Airport Improvement. The AAIA, among other items, established the current-day Airport Improvement Program (AIP) that is administered by the FAA's Office of Airports. Through the AIP, the FAA provides grants to public agencies — and, in limited cases, to private airport owners and operators—for the planning and development of public-use airports that are included in the National Plan of Integrated Airport Systems (NPIAS). The current AIP program built on earlier grant programs that are funded through a variety of user fees and fuel taxes. For more information on the history of the AIP and predecessor grant programs, see <http://www.faa.gov/airports/aip/>.

The AAIA also provides certain prerequisites and conditions that an airport sponsor must meet in order to be eligible for consideration of AIP funding. In 1992, Congress amended various provisions of the AAIA with the Airport and Airway Safety, Capacity, Noise Improvement, and Intermodal Transportation Act, Pub. L. 102-581. Section 113(b), Public Access and Participation with Respect to Airport Projects, amended Section 509(b)(6)(A) of the AAIA (49 U.S.C. 47106(c)(1)(A)) by inserting the following:

(ii) the sponsor of the project certifies to the Secretary that the airport management board either has voting representation from the communities where the project is located or has advised the communities that they have the right to petition the Secretary concerning a proposed project.

The Secretary of the U.S. Department of Transportation has delegated the responsibility to respond to a petition under Section 47106 to the Administrator of the FAA, 49 CFR 1.83(a)(9). The Administrator has further delegated the authority to administer this provision to the Associate Administrator for the Office of Airports (ARP-1). Order 1100.154A¹. The requirement for a sponsor to provide such certification to the FAA is incorporated into FAA Order 5050.4B, National Environmental Policy Act (NEPA) Implementing Instructions for Airport Actions, par. 1203.

II. Purpose.

After receiving a small number of submissions under this provision, the Associate Administrator for the Office of Airports has determined it would be helpful and appropriate to provide the public with more guidance on the procedures and processes associated with this provision:

¹ For clarity, this guidance will continue to use the term “Secretary” in this context.

The Secretary may approve an application under this subchapter for an airport development project involving the location of an airport or runway or a major runway extension only if the sponsor certifies to the Secretary that the airport management board has voting representation from the communities in which the project is located or has advised the communities that they have the right to petition the Secretary about a proposed project[.]

49 U.S.C. Section 47106(c)(1)(A)(ii).

III. Final Guidance

A. Where to File.

The Secretary of the U.S. Department of Transportation has delegated the responsibility to respond to a petition under Section 47106 to the Administrator of the FAA. Accordingly, any petition under this statutory provision should be addressed to the Associate Administrator for the Office of Airports, 800 Independence Avenue, SW, Washington, D.C. 20591.

B. Form and Substance.

The statute does not prescribe any specific format for the submission of a petition. The petition should be a concise statement describing the project to which the petitioner objects, and clearly indicating the petitioner's specific objection to the project. The petition must also include a description of the result the petitioner is seeking. The petition should normally not exceed ten (10) pages. Upon application from the petitioner, the Secretary will consider extending the length of a petition for a large, complex project. Petitions must be legible and must be signed by the petitioner(s), who must be a duly authorized representative(s) of the community (see Section III.D.4 of this Federal Register notice). The FAA will not consider any petition that is not signed by the petitioner(s).

C. Time to File a Petition.

A petition filed under section 47106(c)(1)(A)(ii) should be filed only after the Airport Sponsor notifies a community of its right to file a petition.

Petitions to the Secretary pursuant to Section 47106(c)(1)(A)(ii) must be submitted within thirty (30) days after the FAA gives notice that the sponsor has presented evidence that the requirements of Section 47106(c)(1)(A)(ii) have been fulfilled. Although the environmental analysis and the grant decisions are separate processes and decisions, grant-related findings that are preconditions of issuing a grant are often made in the environmental Record of Decision (ROD). Typically, the FAA demonstrates that the sponsor has satisfied the requirements of Section 47106(c)(1)(A)(ii) in its Final Environmental Impact Statement (FEIS). Generally, the FEIS will contain a certification from the Airport Sponsor either that each community in which the project is located has a voting member on its airport management board, or that each community in which the project is located has been advised of its right to petition the Secretary. Normally the Airport Sponsor will have notified each of the communities prior to the publication of an FEIS, allowing communities at least 30 days to prepare and file a petition.² The thirty-day time to file ensures that communities without voting representation on the airport management board have the same ability to object to or provide input on a project prior to a final decision that grant-related preconditions have been met as those communities that do have voting representation on the airport management board. Additionally, the 30-day period coincides with

² Should the FAA prepare an Environmental Assessment (EA) for a project to which §47106(c)(1)(A)(ii) applies, or an EIS under MAP-21, Section 1319, the time to file a petition to the Secretary will begin to run when the community is informed of its right to file such a petition by the airport sponsor and will expire 30 days after such notification.

the Council on Environmental Quality's (CEQ) requirement that imposes a 30-day "cooling off" period on federal agencies between the publication of an FEIS and a ROD. However, the FAA may also provide notice that the sponsor has fulfilled the requirements of Section 47106(c)(1)(A)(ii) through a Draft EA, a Final EA, a Draft EIS, or via a separate Federal Register Notice. This type of FAA notice would also start the 30-day time limit for a community to file a petition pursuant to Section 47106(c)(1)(A)(ii).

D. Definitions.

(1) Location of an Airport:

For purposes of Section 47106(c)(1)(A)(ii), location of an airport means approval of an airport at a location where no airport exists. This definition is consistent with the definition of the term airport location approval found in FAA Order 5050.4B, National Environmental Policy Act (NEPA) Implementing Instructions for Airport Actions (April 2006). Order 5050.4B defines airport location approval as approval of a new public use airport at a location where no airport exists. (Order 5050.4B, ¶¶ 9.p and 203). In interpreting Section 47106(c)(1)(A)(ii), it is appropriate to be consistent with other FAA interpretations of similar terms. Defining the term location of an airport consistently with the definition in the most current version of Order 5050.4B avoids confusion that could be caused by applying different definitions depending on the circumstances of the inquiry.

(2) Location of a Runway:

While other FAA documents have referred to the location of a runway, none have defined the term. Because the term is similar to the term “location of an airport,” it is appropriate to define the terms in a similar manner. For purposes of Section 47106(c)(1)(A)(ii), location of a runway refers to decisions approving the site of a new or relocated runway where a runway does not currently exist.

(3) Major Runway Extension:

Order 5050.4B defines a major runway extension as one that creates a significant impact to an affected environmental resource (including noise), or one that permanently removes a relocated threshold.³ Removal of a dislocated threshold is not considered a runway extension.⁴ The definition of major runway extension that appears in Order 5050.4B, ¶9.1 will be used in interpreting Section 47106(c)(1)(A)(ii).

(4) Communities in Which the Project is Located:

The term community is not defined in the statute. In the enabling legislation, this provision was entitled “Public Participation With Respect to Airport Projects.” The term “community” will be defined as a jurisdictional authority, that is, a political subdivision of a state, such as a town, township, city, or county. Defining community as a jurisdictional authority is consistent with the context of Section 47106(c). For example, in subsection (A)(i) the statute speaks of “objectives of any planning that the community has carried out.” Typically, only political subdivisions of a state, such as those described above, would have planning authority. Similarly, in the FAA’s

³ A relocated threshold leaves the pavement usable only for taxiing.

⁴ Pavement beyond a dislocated threshold is available for takeoff.

experience, only a jurisdictional authority or political subdivision would be considered for voting representation on the airport's governing authority. It is only in the absence of such voting representation of a jurisdictional authority or political subdivision that the statute provides the opportunity to petition the Secretary.

Defining community as a jurisdictional authority or political subdivision is also consistent with the definition of community in Order 5050.4B, ¶1203(b)(1).

Accordingly, only a political subdivision of a state that enjoys general jurisdiction, or a Tribal government meets the definition of community in this context. Political subdivisions of a state that have a specific, substantive authority, such as water districts or school districts, do not adequately represent the interests of the community at large. They are not required to balance the interests of the whole community on a wide range of issues. Rather, they seek to promote their specific substantive interest. Additionally, water districts or school districts would not normally be invited to sit on an airport management board. Thus, only a political subdivision of a state which enjoys general jurisdiction is a community entitled to file a petition under Section 47106(c)(1)(A)(ii).

Finally, under the statute, a community is only eligible to petition under Section 47106(c)(1)(A)(ii) if the project is located in the community. If land is disturbed in the community, then the project is considered to be located in that community. The courts have also provided instruction on when a project is located in a community. In City of Bridgeton v. FAA, 212 F. 3d 448 (8th Cir. 2000), the court determined that a community in which there was no construction and no significant noise impact could not challenge the failure to notify it that it could petition the Secretary. Thus, outside the construction context, a project may be located in

a community only if the project will have a significant impact on the community. For example, where a project will cause a significant noise impact on a community, the project is located in that community. If the project does not create a significant impact in the community, the community will have no right to petition the Secretary.

E. Other Considerations.

There are currently ten states that participate in the FAA's State Block Grant Program (SBGP). Under the program, the State agency (usually the aviation division of the state Department of Transportation) assumes responsibility for administering AIP grants for non-primary airports (including several categories of AIP funds). See 49 U.S.C. Section 47128. As part of the responsibility, the state assumes various responsibilities for the FAA including reviewing and approving proposed changes to the Airport Layout Plan (ALP) and compliance with the National Environmental Policy Act (NEPA).

The FAA interprets 49 U.S.C. Section 47106(c)(1)(A)(ii) as not being generally applicable to a project approved and administered as part of a state block grant. The plain language of this statutory provision states that this Section is triggered when a proponent submits a project grant application to the FAA. In the case of the SBGP, no such request is made because most of the funds are given to the states as a block (except for AIP Discretionary funds), and the state assumes responsibility for administering those funds. Participants in the SBGP are required to engage communities according to FAA guidance and to circulate the draft EA if warranted. However, in cases where the project may involve a request for AIP Discretionary funding, or other extraordinary circumstances, the FAA may determine that a community meeting the

requirements set forth herein may have the right to petition the Secretary in connection with an AIP grant. Petitions involving a SBGP project must include facts describing the extraordinary circumstances that they believe justify the Secretary entertaining the petition.

F. Agency Response.

The FAA will provide a written response to a petition to the Secretary. The FAA may respond by outlining the issues raised in the petition and providing its responses either within the environmental ROD, or it may elect to respond in a separate document.

Authority. 49 USC 47106(c)(1)(A)(ii), 14 CFR part 1.

Issued in Washington, DC, on March 22, 2016.

Elliott Black,

Director, Office of Airport Planning and Programming APP-001.

[FR Doc. 2016-07165 Filed: 3/29/2016 8:45 am; Publication Date: 3/30/2016]